



In The Matter Of:

KEVIN JAMES,

CASE NO. 94-WPC-4

COMPLAINANT,

DATE: June 28, 1996

v.

KETCHIKAN PULP COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

ORDER DENYING REQUEST FOR RECONSIDERATION AND REHEARING

This case arises under the employee protection provision of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1367 (1988). In a March 15, 1996 Final Decision and Order, the Secretary of Labor found that Respondent, Ketchikan Pulp Company (KPC) violated the employee protection provision when it suspended Complainant, Kevin James, because of his cooperation with the Environmental Protection Agency concerning KPC's violations of the Clean Water Act. The Secretary also found that KPC discharged James lawfully after it learned that he had falsified certain expenses claimed in 1990 while traveling to another state for plastic surgery relating to a work injury. As remedies for the discriminatory suspension, the Secretary ordered KPC to post a copy of a notice concerning employees' rights and to pay the reasonable fees and costs James incurred in bringing the complaint.

James has moved for reconsideration and rehearing of the Final Decision and Order. He contends that evidence he obtained after the record closed in this case shows that KPC witnesses

^{1/} On April 17, 1996 a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under this statute and these regulations to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996) (copy attached).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order and regulations under which the Board now issues final agency decisions. A copy of the final procedural revisions to the regulations (61 Fed. Reg. 19982), implementing this reorganization is also attached. The Board has reviewed the entire record in this case, including the Secretary's final decision and order.

testified untruthfully in the administrative hearing concerning the company's knowledge of James' protected activities and its investigation of James. KPC opposes the motion.

The tendered new evidence concerns an issue on which James prevailed before the Secretary, who explicitly found that James was singled out for suspension because of his protected activities. Implicit in this finding is the recognition that James discriminatorily was targeted for investigation by KPC. Notwithstanding KPC's impermissible motive in investigating James, however, the company uncovered evidence that justified firing him. As the Supreme Court recognized in *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879, 1995 U.S. LEXIS 699 at *19: "Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit."

Here, the Secretary followed the Supreme Court's guidance and did not require KPC to ignore the evidence it uncovered, even though KPC's motive for conducting the investigation was wrongful. The Supreme Court recognized in *McKennon* that an award of attorney's fees and, in appropriate cases, an additional sanction may be employed to diminish the willingness of employers to "undertake extensive discovery into an employee's background or performance to resist claims." *Id.* at *20. In this case, we believe that the Secretary's decision awarding attorney's fees and costs to James is a sufficient deterrent.

Since none of the evidence tendered by James concerns whether he falsified his claimed expenses, we decline to reopen or reconsider the Secretary's decision.^{2/} See 29 C.F.R. §

^{2/} We note that James claimed expenses of over \$3600 for more than one month of food and lodging, but offered no proof of payment or credible evidence that he actually incurred the claimed expenses. We deem this false claim to be significant and an appropriate justification for James' discharge.

18.54(c)(1995) and *Timmons v. Mattingly Testing Services*, Case No. 95-ERA-40, Dec. and Ord. of Remand, June 21, 1996 (material evidence justifying reopening must be outcome-determinative).

Accordingly, the request for rehearing and for reconsideration is DENIED.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member